

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BETTY J. ESQUIBEL-NEAL

Claimant

VS.

STATE OF KANSAS

Self-Insured Respondent

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Docket Nos. 189,357
& 1,012,969

ORDER

Claimant appealed the August 19, 2004 Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant requests medical benefits for her right shoulder. Claimant contends her present need for medical treatment is either the natural consequence of a 1989 automobile accident, which is the subject of Docket No. 189,357, or the result of a series of traumas from restraining mentally disabled patients while working for respondent through her last day of employment with respondent in December 2003, which is the subject of Docket No. 1,012,969.¹ The parties and Judge Benedict addressed both theories at the August 18, 2004 hearing. Consequently, this is a preliminary hearing request under K.S.A. 44-534a in Docket No. 1,012,969, but a request for post-award medical benefits under K.S.A. 44-510k in Docket No. 189,357.

At the conclusion of the August 18, 2004 hearing, Judge Benedict denied claimant's request for medical treatment. The Judge stated, in part:

The Court finds that the Claimant has not met her burden of proof that she did injure her right shoulder, either in the motor vehicle accident, or that this arose out of any employment subsequent to that accident. Therefore, the request for treatment will be denied.²

¹ P.H. Trans. at 5.

² *Id.* at 46.

Claimant contends Judge Benedict erred. Claimant now argues the evidence clearly establishes that her work for respondent through December 2003 aggravated her previously injured right shoulder or is the natural progression of the 1989 automobile accident. Accordingly, claimant requests the Board to award her medical treatment.

Conversely, respondent argues the Board should affirm the August 19, 2004 Order. Respondent argues claimant failed to give timely notice of the new accidental injury to the right shoulder that is alleged in Docket No. 1,012,969 and that claimant failed to prove her present need for medical treatment to the right shoulder is related to the 1989 automobile accident.

The only issues before the Board on this appeal are:

1. Did claimant prove her present need for medical treatment to her right shoulder is either the natural consequence of her 1989 automobile accident or due to a series of traumas sustained while working for respondent through December 2003?
2. If claimant injured her right shoulder due to a series of traumas working for respondent, did claimant provide respondent with timely notice of that accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes claimant has failed to prove her present need for medical treatment is either related to her 1989 automobile accident or the result of a new injury sustained at work. Accordingly, the August 19, 2004 Order should be affirmed.

Claimant worked for respondent for approximately 43 years before retiring in December 2003. In May 1989, claimant was involved in a work-related automobile accident and injured both shoulders. As indicated above, that accident is the subject of Docket No. 189,357. In January 1995, the parties entered into a running award under that docket number. As part of that award, claimant retained the right to apply for future medical benefits.

Claimant now seeks medical benefits for her right shoulder.

In November 2003, claimant was evaluated by Dr. Edward J. Prostic at her attorney's request. Years earlier, Dr. Prostic had examined claimant in July 1994 and indicated in his July 27, 1994 report that claimant's May 1989 automobile accident had aggravated preexisting osteoarthritis in her shoulders, low back and knees. Further, the doctor stated claimant would eventually require total knee and total shoulder arthroplasty.

With regard to the November 2003 evaluation, Dr. Prostic wrote in his November 24, 2003 report that claimant had progressive osteoarthritis in the right shoulder and would need total joint replacement arthroplasty in the near future. But Dr. Prostic did not specifically relate the need for the arthroplasty to either claimant's 1989 accident or the alleged series of traumas ending in December 2003.

Dr. Peter S. Lapse evaluated claimant on January 20, 2004. As claimant's treating physician, Dr. Lapse had performed a total left shoulder arthroplasty in October 1995 and a total right knee arthroplasty in September 2000. When the doctor had seen claimant in December 1998, he wrote in his December 16, 1998 office notes that claimant was complaining of pain in her right shoulder. Further, Dr. Lapse stated claimant did not want to consider total right shoulder replacement at that time but he thought claimant should consider the surgery when she could no longer tolerate the pain.

After evaluating claimant in January 2004, Dr. Lapse diagnosed right shoulder osteoarthritis and recommended a total shoulder arthroplasty. When asked by respondent whether the need for the total right shoulder arthroplasty was directly related to claimant's 1989 work-related accident, Dr. Lapse opined in an April 23, 2004 letter that the need for that surgery was not directly related to the 1989 accident. The doctor did not provide an opinion as to the recommended surgery's relationship, if any, to the alleged series of traumas ending in December 2003.

Injured workers have the burden to prove their right to an award of benefits and to prove the various conditions on which that right depends.³ Claimant testified that restraining patients undergoing hearing tests caused her right shoulder to hurt. The hearing tests were performed one day a week, and sometimes more than one day a week, for at least half of the day. Diane Wagner, whose responsibilities include handling workers compensation claims at the location where claimant worked, testified claimant related her shoulder problems to the 1989 automobile accident. There is no medical opinion in the record relating the need for the total right shoulder arthroplasty to the alleged series of traumas through December 2003. Further, Dr. Lapse stated in April 2004 that the need for that surgery was not directly related to the 1989 accident.

At this juncture, claimant has failed to prove that her present need for medical treatment is related to the 1989 work-related accident or the claimed series of traumas while working for respondent through December 2003. Therefore, the August 19, 2004 Order should be affirmed. The issue of timely notice for the alleged series of traumas ending in December 2003 is moot.

³ See K.S.A. 44-501(a).

WHEREFORE, the Board affirms the August 19, 2004 Order.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Marcia L. Yates, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director